No. 72-664

DEC 27 19

MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1972

DAVID CALVIN BECKER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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RESPONSE TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The Solicitor General in his memorandum in opposition to the Petition for Certiorari states that "Thus this is not a case in which perjury by a government witness has been committed; indeed, it is not even certain that the witness' testimony was mistaken." This statement by the government is contrary to prior admissions by the United States Attorneys in two briefs filed in the United States Court of Appeals. In the first answer of the government to Peti-

tioner's Brief, the United States Attorney stated, "We admit that the defendant has shown Mr. Burns was in error when he said that Government's Exhibit 15 was from a second printing." (Answer of Appellee to Supplemental Brief, p. 4) In a second answer of the government to the petitioner's supplemental brief, the United States Attorney admitted, "In this case, the small amount of false testimony was inadvertent and unknown at the time of the trial." The false testimony referred to documents which were found by the trial judge to be "crucial" and integral to the petitioner's defense. The United States Court of Appeals in its Opinion either ignored or failed to note the admissions of the United States Attorneys in their briefs.

At another point in his memorandum the Solicitor General contradicts the above statement by stating that Government's witness Burns' testimony tended to show that the warehouse receipt, Government Exhibit 15, the document considered by the trial court to be "crucial and integral to the defense" was a fabrication (govt's mem. p. 3).

The petitioner was sentenced on June 23, 1970. On October 27, 1970, the United States Attorneys prosecuting the case, the government witness Burns and an F.B.I. agent, an expert on questioned documents, were shown conclusive proof that Government's Exhibit 15 was not fabricated, and that Burns stated he could have made a ghastly mistake. (Becker's Aff. in support of motion for a new trial based on newly discovered evidence.) However, the United States Attorneys who prosecuted the case did nothing to call to the Court's attention that they had learned shortly after the conviction that the document was not fabricated, nor did they inform the trial court that its belief that petitioner and his lawyers were involved in fabrication of the document was unwarranted.

The government argues that the accuracy of Burns' testimony could have been challenged by cross-examination. The petitioner could not readily break down the so-called expert by cross examination without the assistance of an expert to advise him. If the testimony was false, the failure of cross-examination does not effect the claim that the petitioner was convicted on false testimony. However it is important for this court to know that when Burns finished his direct examination, counsel for the petitioner asked for a recess to assess and to determine how to meet the unexpected and devastating testimony of Burns. This request for a recess was for only a few minutes, but this reasonable request was rejected. We suggest that this arbitrary ruling by the trial court was caused by the trial court's ire at what he believed was a fabrication of the document by the petitioner and his lawyers. This view was later demonstrated by its order on the United States Attorneys to investigate not only the defendant but also his lawyers regarding the documents which the trial court believed were a fabrication, an accusation which was later proved to be incorrect. The issue in this case is whether a conviction based on false testimony of a material matter given by a government witness should be permitted to stand, and not whether cross examination of the witness could have proved the witness to have given false testimony.

The Solicitor General argues that the petitioner contends for the first time that Burns' false testimony influenced the District Court in sentencing the defendant and therefore this issue is not before the court. This argument is without the slightest merit. The motion for a new trial based on newly discovered evidence raised the issue of the impact upon the Judge as a result of what he believed to be fabricated testimony. This was indicated by the action of the trial judge who ordered a full scale investiga-

tion of the defendant and his lawyers concerning the documents. And, when the petitioner came before the trial court for sentencing, the prosecuting attorney argued that the defendant used a phony document to cover up his guilt, (Tr. 82) and thereupon the trial court proceeded to sentence him to a maximum term of 5 years imprisonment. This was a severe and unjust penalty to be meted out to the petitioner because of the trial Court's mistaken belief that petitioner attempted to cover up his guilt by the use of a fabricated document.

We submit that this court should not permit the integrity of our judicial system be diminished by permitting an accused to be convicted on false testimony on a material issue and where the court was influenced in passing sentence on the petitioner by the false testimony. Due process of law and the fair administration of justice require that the petitioner be given a new trial.

Respectfully submitted,

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